

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA)	CASE NO. 5:10-CR-290
)	
Plaintiff,)	JUDGE JAMES GWIN
)	
vs.)	
)	<u>DEFENDANT'S</u>
SAMUEL R. CICCOLINI,)	<u>SENTENCING MEMORANDUM</u>
)	
Defendant.)	
)	

Now comes Defendant Samuel R. Ciccolini, by and through duly authorized counsel, and files his Sentencing Memorandum in advance of the imposition of sentence. Defendant respectfully requests this honorable court to consider a sentence that is sufficient but not greater than necessary, to comply with the purposes of 18 U.S.C. 3553. Defendant further incorporates herein the evidence proffered for the record prior to the re-sentencing hearing as well as the written objections to the PSR reflected therein. Specifically, Defendant asks that his advisory guideline be calculated pursuant to the terms of the plea agreement executed with the United States of America, with adjustment for his acceptance of responsibility. Defendant also respectfully requests that the enhancement of the base offense level for any obstruction of justice as contemplated at the time of the prior sentencing be eliminated.

In consideration of the totality of the evidence, the nature of the offenses for which Defendant has voluntarily pled guilty and his lifelong service to the community, Defendant asks for a downward departure and variance from the advisory guidelines to achieve a sentence that is

consistent with a minimum period of confinement and the strict supervised release conditions that he has been following since 2010.

Defendant requests that the court review the following Memorandum in Support provided in mitigation of his offenses and that such evidence be made a part of the record.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Background and Relevant Offense Conduct

Defendant Father Sam Ciccolini voluntarily entered pleas of guilty as charged in an information, to one count of Structuring Financial Transactions to Evade Reporting Requirements and to one count of Making and Subscribing a False Tax Return on July 23, 2010. A presentence investigation was conducted and the original sentencing hearing occurred in October, 2010. The investigation against Father Sam commenced in January 2008 and involved approximately 2.5 years of his cooperation with the Internal Revenue Service as well as the United States Attorney's Office. A written plea agreement outlined the offense conduct and summarized the evidence that was obtained in the lengthy investigation.

Specifically, in regard to the Structuring offense, the plea agreement outlined the offense to involve 139 deposits of cash made by Defendant during the period between March and June of 2003 which totaled \$1,038,680.00. Each deposit was made in increments of less than \$10,000 in order to avoid the filing of any currency transaction report or other notification by the financial institutions. As contemplated in 31 U.S.C. Section 5324 (a)(3) and pursuant to USSG 2S1.3, the base offense level was calculated at 6. An increase of 16 levels was calculated under USSG 2B1.1 since the transactions totaled in excess of one million dollars. However, the plea agreement outlined a further reduction in the base offense level in accord with USSG 2S1.3(b)(3) since the evidence in question and offense conduct did not establish that Father Sam acted with reckless disregard of the source of the funds nor did the funds represent the proceeds of unlawful activity. Accordingly, the base offense level was calculated by the parties at a level 6 without further enhancement. Thus, Defendant asserts that there is no evidence to support a finding that the

cash deposits made were illegally obtained or a calculation of the offense level not in accord with the plea agreement.

With regard to Count 2, the plea agreement outlined Defendant's filing of false income tax returns for the years 2002 and 2006. The investigation revealed that he failed to include his receipt of additional income which totaled approximately \$945,635.00 during the relevant time period. Accordingly, the advisory guideline was computed to be at a base offense level of 18 prior to any adjustment for acceptance of responsibility for this violation of 26 U.S.C. Section 7206 (1). The plea agreement further included the government's acknowledgement of Father Sam's cooperation and payment of the unpaid taxes in the amount of \$292,136.00 as of December 31, 2008, more than 18 months prior to his entering of a guilty plea to the offense.

The plea agreement did not outline any action on the part of Father Sam that the United States considered an obstruction of justice and included a statement that the government had no evidence that Defendant has not "affirmatively accepted personal responsibility" for his criminal conduct. Notwithstanding the terms of the plea agreement and the evidence adduced in the investigation, the government has attempted to assert its belief that the cash deposited in 2003 was the result of illegal conduct on the part of Defendant, namely the misappropriation of funds from his employer, Interval Brotherhood Homes (IBH) during the period of 2001 to 2008. At the time of the original sentencing the Assistant United States Attorney engaged in the following exchange with the District Court:

Bulford: *"If I may, Your Honor, after the investigation was completed and because it was a tax investigation and we had no -- IBH was not claiming they were a victim, were not coming in and saying, you know, 'He took money from us, prosecute him,' we did -- IRS in their procedure sends the investigation, after the agent prepares the investigation, to IRS Tax counsel who then forwards it to IRS -- excuse me -- to DOJ, main Justice in Washington tax division, and they evaluate the recommendations from IRS and come to a conclusion of what should be done.*

We then get a memo back, a cross-memo back from DOJ Tax saying "You are authorized to go forward with these kinds of counts."

The explanation for the source of money that was structured, I was skeptical about that, quite frankly, and we had an internal debate between IRS, DOJ, and myself and the U.S. Attorney's Office.

And the DOJ Tax counsel had written to us that they felt we'd have a hard time, based on the evidence we had, proving that the money that was structured in was proceeds of criminal activity. And they suggested that -- quite frankly, at one point in time they suggested we didn't even charge the structuring. I insisted on charging the structuring."

Transcript of Sentencing Hearing of October 20, 2010, pp. 10,11.

These acknowledgements demonstrate an unwillingness on the part of the government to stand behind the agreement made and an overall lack of evidence to the contrary to support any enhancement or the structuring offense as a whole.

Despite such implications, the results of the financial review by multiple accounting firms including Stinnett, Padrutt & Aranyosi and Linc, Malachin, Dennis & Dimenga, Inc., failed to disclose any evidence that the structured funds were obtained by any illegal ways as maintained by Father Sam¹. Father Sam has openly acknowledged that he misappropriated funds by invoicing the IBH for donated services during 2001 through 2008. He voluntarily reported these activities to the Board of Directors and to the government during the course of the investigation and voluntarily repaid the sum of \$1,288,683.00 for these funds accumulated into his personal accounts. While these funds were the income that he failed to report in his income tax filings as charged in Count 2 of the Information, it was not the source of the cash deposits

¹ In a response to Defendant's objections to the PSR, AUSA Bulford attempted to argue that Father Sam has admitted that the proceeds of the structuring offense were funds that he illegally obtained from IBH. This accusation is untrue. While Father Sam has admitted wrongdoing in misappropriating IBH funds, he has never admitted that these were the monies deposited. A review of the timing of the deposits in 2003 and the unrelated conduct with invoices provided to IBH demonstrates that the funds were not the same.

structured. There is not one single piece of evidence that supports the source of the deposits as illegal proceeds and the totality of the financial records proffered, as well as reviewed in the investigation, cannot refute the admissions made by Father Sam and resulting in the express terms of the plea agreement. Defendant respectfully asks that the advisory guidelines be calculated in accord with the agreement of the parties and the evidence disclosed.

The personal history and background of Father Sam was outlined at length by his prior attorneys in the sentencing memorandum filed on September 30, 2010 and is incorporated herein by reference. See doc #10. Defendant also asks the court to consider the multiple proffers that have been made which demonstrate the level of commitment that he has made to the Catholic church, the IBH and the Akron community at large during his 40 plus years of service as an ordained priest. Specifically, his own description of the growth of the IBH during his tenure and his vision of its future illustrate his devotion to the home, including personal gifts in excess of one million dollars during his years of service². He personally helped to establish the home in 1976 and was responsible for the sacrifices that were necessary to keep its lights on and doors open through the years.³ He also oversaw the acquisition of additional land and construction of the multiple buildings that now comprise the IBH. At the time of his resignation, he left a thriving mission that encompassed in excess of \$15,000,000.00 in total assets. Father Sam was a tireless advocate for the many men and women who suffered from alcohol and substance abuse as well as the underprivileged of the community in general. This lifetime of service cannot be and his good works cannot be refuted.

² See the Personal Accounting Records of Defendant contained in Part One of the Proffer of Financial Records filed with the court on September 4, 2012.

³ See the Personal Accounting Records of Defendant contained in Part Two of the Proffer of Financial Records filed with the court on September 4, 2012.

Moreover, the evidence proffered and disclosed during the investigation also demonstrated Father Sam's support of the staff and volunteers at IBH and his practice of providing assistance in times of need. The records detail the use of personal funds and separate gifts in order to maintain a support system during emergencies. These activities are key in that they reveal his rationale for his unorthodox practice of accumulating and hoarding cash throughout the years. He had lived through the lean years when every single dollar was needed to support the mission and he lived in fear that the existence of the IBH necessitated the ability to have cash on hand if funding or other losses occurred. He constantly worried that the funding sources would dry up and in fact during the time period of 2003 and 2004, the home experienced a shortfall due to federal cutbacks in its funding. Because of his dogged determination in saving every dollar possible, the IBH could use its accumulated resources to maintain its ongoing work.

While Father Sam's conduct as outlined by the government during the time period in question is admitted, his motivation is harder to understand. Early in 2003, he heard news reports that the currency form in the United States might change which would render his cash on hand from his years of hoarding his personal resources useless. By his own account, Father Sam panicked and decided that he needed to deposit the cash into the bank but was concerned as to how it could be accomplished. After speaking with his bank, he learned that transactions of \$10,000.00 or more required the filing of a transaction report. Since the funds represented gifts and other monies that he had accumulated over decades, he was concerned that it not appear as revenue from a single year or time period. This concern led him to knowingly structure the 139 deposits between April and June 2003 as alleged. He acknowledged his wrongdoing and accepts responsibility for this conduct. He admitted his actions to the government and the federal agents from the outset of the investigation in January 2008. There has been no express allegation or

charge that the money deposited was illegally obtained or that any “money laundering” is involved as outlined above. Whatever questions as to his rationale for making the deposits or incredulity at his actions, the evidence in its totality does not dispute his explanation provided at all times herein.

II. ACCEPTANCE OF RESPONSIBILITY AND OBSTRUCTION OF JUSTICE

Father Sam submits that he has demonstrated a clear acceptance of responsibility in this case and has made an honest accounting of his activities and his reasoning. From the outset of the contact with the government in January, 2008, he has made every effort to cooperate with the investigation and has freely proffered both statements and documents to aid in the process. He further commissioned a full-scale audit of all of the matters investigated at his sole expense and granted access of his personal financial records as well as those maintained on behalf of IBH. Additionally, he cooperated with the subsequent audits conducted by the IBH and its foundation by Mark Malachin, as well as Summit County, related to the compliance with all federal requirements and provided all of his records in this process. He personally acknowledged his misappropriation of funds to the Board of Directors and its President despite the lack of any criminal charge in connection with this conduct and he personally repaid the monies to IBH in the sum of \$1,288,683.00 in 2008. Finally, he paid in full the sum of \$292, 136.00 representing the amount of unpaid taxes due and owing. At the time of the original sentencing, there were no monies due and owing to anyone, not the government, the IRS or the IBH by Father Sam. The record as a whole is replete with the multiple acts of acceptance of responsibility as exhibited by Father Sam. Additionally, the terms of the written plea agreement states that the government has no evidence that Defendant has not “affirmatively accepted personal responsibility” for his criminal conduct and recommends the two level reduction as well as an additional one level at

time of sentencing. At the time of the original sentencing hearing, this court determined that Defendant was untruthful in statements made to the Probation Department and at the time of the plea colloquy without specifying such alleged conduct. The denial of acceptance of responsibility was based in part on the assumption that the source of the structuring offense included monies misappropriated and thus, his statements made during his plea were deemed untruthful. Neither the original PSR nor its updated version on August 15, 2012, detail any untruthful conduct on the part of Defendant based upon the investigation of the United States Probation Department. Rather the updated report merely restates that the court denied acceptance at the time of the original sentencing. Defendant objects to the denial of acceptance and asserts that the overall record shows that he has “truthfully admitted the conduct comprising the offenses of conviction and truthfully admitted or not falsely denied any relevant conduct.” See, Amendment 459, Appendix C, Commentary of the Sentencing Commission to USSG, 1992. Absent specific evidence identified and verified by the US Probation Department or United States of America as specified offense conduct, the acceptance of responsibility should be afforded to Father Sam. At the very least, the written plea agreement and its designation of relevant offense conduct should take precedence.⁴

Similarly, any enhancement to the base offense levels because of Father Sam’s obstruction of justice is not supported by the evidence in its entirety. Defendant objects to the application of the 2 level enhancement for alleged obstruction of justice pursuant to USSG 3C1.1, as previously determined at the time of the prior sentencing hearing. The allegation that Defendant had not been truthful during his plea colloquy because he refused to acknowledge that

⁴ Further, at the time of the original PSR completed in August 2010 and amended in October 2010, the Probation Department applied the adjustment of the base offense level for acceptance of responsibility as required by the plea agreement. See page 12 of the original PSR filed as part of the record on 1/31/11.

the source of the structured transactions were achieved through illegal activities is without any evidentiary support. Defendant objects to this application and enhancement and asserts that he has been truthful at all times up to and including all criminal proceedings before the District Court. The written plea agreement calculates the specific offense characteristics at a level 6 which expressly contemplates the source of the structured funds as legally obtained. The Probation Department, as the result of its independent investigation or upon review of specific conduct, cannot determine that Defendant obstructed justice and the addition of 2 levels is without merit or legal support. Defendant asserts that the adjusted base offense level for count one should be level 6 without enhancement for obstruction of justice.⁵

III. SENTENCING CONSIDERATIONS

As this court is well aware, the U.S. Supreme Court has held that the U.S. Sentencing Guidelines are effectively advisory. *United States v. Booker*, 543 U.S. 220 (2005). The Court held that the Guidelines are advisory in all cases, even where they can be applied without judicial fact-finding. *Id.* at 250. The Supreme Court told sentencing courts that even without the mandatory provision, the [sentencing reform] Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals, specifically citing those goals listed in 18 U.S.C. 3553(a). *Id.* at 246. 18 U.S.C. §3553(a) provides in relevant part: the court shall impose a sentence sufficient, but not greater than necessary to comply with the purposes set forth in paragraph (2) ... [and] shall consider

- (1) the nature and circumstances of the offense and the history characteristics of the defendant;

⁵ Further, at the time of the original PSR completed in August 2010 and amended in October 2010, the Probation Department did not identify any basis for the adjustment of the base offense level for obstruction of justice nor did the terms of the plea agreement. See page 11 of the original PSR filed as part of the record on 1/31/11.

- (2) the need for the sentence imposed
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for...the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines; The district court was unreasonable in its consideration of the nature and circumstances of the offense and the history and characteristics of this individual offender. 18 U.S.C. § 3553(a)(1).

On December 10, 2007, the Supreme Court also decided *Gall v. United States*, 128 S. Ct. 586 (2007) which held that “it is... clear that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain [his/her] conclusion that any unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications.” It specifically rejected “an appellate rule that requires extraordinary circumstances to justify a sentence outside the Guidelines range or the “...the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.” *Id.* at 594-595. Thus, *Gall* instructs that “...while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—

whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.” *Id.* At p. 595.

Gall also reinforced a district court's traditional role in sentencing matters holding that “[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” *Id.* at 598 (citing *Koon v. United States*, 518 U.S. 81 at 113 (1996)). Further, in *United States v. Grossman* at 596, this court recognized that:

“[p]erhaps most importantly, *Gall* shows that the sentencing process involves an exercise in judgment, not a mathematical proof. As a result, appellate courts must ‘give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance ... and due deference to the sentencing judge's on-the-scene assessment of the competing considerations...which is to say, not just abuse-of-discretion review to the reasonableness of a sentence but abuse-of-discretion review to the district court's determination that there is a legitimate correlation between the size of the variance and the reasons given for it...”

(Internal citations omitted.)

A review of the record reveals that this court reviewed the factual allegations set forth in the information filed but was not persuaded by express language of the charge or the plea agreement executed by the parties at the time of the original sentencing. Although Father Sam entered pleas of guilt to one count of Structuring transactions to avoid accounting provisions and one count of Filing a false income tax return, the focus was placed on the allegations of embezzlement and the source of the monies that were illegally structured. Defendant asserts that the government and his own attorneys spent the better part of three (3) years investigating the allegations of the within matter prior to the filing of the information and the terms of the plea agreement. Father Sam voluntarily made numerous proffers wherein he admitted to the conduct outlined in the

information and submitted to at least two (2) complete audits of the financial records of the IBF as well as his own personal holdings. Such evidence was then reviewed by both the U.S. Attorney's office and the Department of Justice Tax Counsel prior to arriving at the charges contained in the information or the plea agreement offered and ultimately accepted by the government. Given the history of the investigation and case proceedings, the prior express agreement of the parties and the independent findings, it is difficult to fathom how the government can willingly fail to defend the plea terms without any objection or try to imply facts that have no evidentiary support.

A review of the record in its totality and the sentencing factors mandated by law demonstrate that the advisory guidelines should be calculated at the very least in accord with the plea agreement. Father Sam's cooperation in the investigation, his timely decision to plead guilty without the procedural safeguard of an indictment and his voluntary repayment of any monies due to the IBF and/or the IRS prior to sentencing is evidence of his efforts to atone for his mistakes. Further, his continued conduct while on supervised release post sentencing further provides the court with evidence of his ongoing efforts to live a life deserving of consideration as contemplated in *Pepper v. United States*, 131 S.Ct. 1229, (2011). (See *Pepper*, holding that the post sentencing conduct of a defendant and any applicable amendments to the US Sentencing Guidelines upon a remand to the trial court for resentencing shall be considered.) Overall, Father Sam has demonstrated that his offense conduct must be weighed and balanced against the years of lifelong service to the church and community as well as his efforts since the onset of the government's investigation.

IV. GROUNDS FOR DEPARTURE AND VARIANCE

Defendant has identified multiple grounds for the court's downward departure or variance from the advisory guideline range contemplated in this matter. Sixth Circuit jurisprudence shows that a district court judge has the statutory ability to vary downward from the guidelines. *United States v. Grossman*, 513 F.3d 592 (6th Cir. 2008), a case decided after the *Gall* and *Kimbrough* decisions, involves a possession of child pornography, albeit an offense not similar to the instant case. The Sixth Circuit determined that the district court did not commit any procedural or substantive errors when it upheld a district court's downward variance from a range of 135-168 months to sixty-six months imprisonment with ten years of supervised release. Although the district court expressed concerns over the enhancements to the child pornography guidelines, the Sixth Circuit determined that the district court properly applied 18 U.S.C. § 3553(a) factors to justify the sentence. Accordingly, while the court accounted for concerns that the sentence protect society and deter future criminal conduct, it opted to pursue those goals, not through a longer term of imprisonment, but through extensive counseling and treatment and an extensive period of supervised release, which itself contains substantial limitations on an individual's freedom. *See, Gall*, 128 S.Ct. at 595-96, *Grossman*, 513 F.3d at 597.

A sentencing court is thus required to take the defendant's criminal history and situational characteristics into account when it is rendering an appropriate sentence. Noting that a defendant has suffered irreparable harm and grave consequences as a result of his actions is a necessary observation in the sentencing process. *United States v. Baird*, 580 F. Supp. 2d 889, 2008 U.S. Dist. LEXIS 2338, *15 (D. Neb. 2008). It is allowable for courts to take into consideration the fact that a certain conviction can carry a significant stigma. *Id.* (District Court was free to take the stigma of a child pornography conviction into account in crafting a sentence

that departed from the sentencing guidelines). In this case, Father Sam has been convicted of Structuring and Creating a False Tax Return. Due to his image and prestige in the community, this conviction essentially ruined everything that he spent his life's work building. The stigma involved is "an additional substantial punishment" that has been especially damaging to Ciccolini. *United States v. Shipley*, 560 F. Supp. 739, 745 (S.D. Iowa 2008).

The best evidence in support of a downward departure or variance to arrive at a sentence that does not include a lengthy period of confinement can be found in the words of this court at the time of the original sentencing. In addressing the Defendant at the time of the original sentencing, this court stated:

"You are 68 years old, and you are an ordained priest. You came to the ministry relatively early in life, and you've given yeomen's service to any number of good causes, but especially this drug and alcohol treatment center in Akron.

It's many ways kind of sad because it's obvious that you were a huge success and that people invested unbelievable trust in you and probably deserved trust, but it appears that you betrayed much of that.

You do not have any criminal convictions.

You've got some relatively serious health issues, including some heart conditions, some dental conditions, and you've got some significant limitations resulting from that.

You also should obviously stop smoking.

You have given a lifetime of service to your community through this, this brotherhood, and for that, that speaks significantly that the sentence can be lower."

Transcript of Sentencing Hearing of October 20, 2010, p. 67.

In relation to issues of punishment, adequate deterrence and protection of the public as contemplated by 18 U.S.C. 3553(a)(2), the court openly acknowledged that there was no likelihood that Defendant would reoffend. Similarly, when considering the seriousness of the

offense, the court indicated no need for incapacitation in order to protect the public. Given these specific findings, the custodial sentence of one day based upon the finding of multiple grounds for a downward departure previously issued by this court cannot be found to be unreasonable.

Moreover, it has long been held that the right to Due Process prohibits a court from imposing a harsher sentence on a defendant at re-sentencing to punish him for exercising his right to appeal. *Gonzales v. Wolfe*, 290 Fed.Appx. 799 (6th Cir. 2008). “To protect a defendant’s Due Process rights, ‘appellate courts must apply a presumption that the trial court acted vindictively when a harsher sentence is imposed following appeal.’” *Gonzales* at p. 813. See also the recent decision of *United States v. McFalls*, 675 F.3d 599, (6th Cir. 2012) which upheld this proposition of law absent some change in circumstance such as the substitution of another judge at the time of resentencing. Accordingly, Defendant respectfully urges the court to find that his age and health as well as his “yeoman service” to the community throughout his lifetime still merit a sentence that does not necessitate confinement.

The government has alleged that uniformity in sentencing mandate the imposition of prison in this case. Additionally, in the appellate brief filed by the United States to the Sixth Circuit in this matter, it was asserted that this court’s sentence sent the message that if a defendant has money, then he can avoid jail. Specifically, the government stated that..... “it sends a message that the tax offense need not result in prison time if the defendant is subject to restitution and fines. The sentence could also lead to arbitrary sentencing disparities if the district court's reasoning is followed to its logical extreme. Those who are able to pay restitution and fines are less likely to face significant jail time.” Principal Brief of United States of America, page 32. Thus, the implication, as asserted by the government is that this court’s analysis of all

the sentencing factors sends a message that a defendant may “purchase”⁶ his freedom by paying restitution or other financial sanctions. The decision was appealed by the United States and is now before this court again for resentencing. It is clear that due to the nature of the convictions and the specific facts herein, restitution is not owed and statutorily prohibited. Therefore, the restitution paid forthwith in 2010 by Defendant must be returned and this component cannot be included in any new sentence issued. However, if this court reverses its own analysis of all the sentencing factors and its finding that justice is not served by the incarceration of Father Sam, the message will ring loud and clear in reverse. In other words, if this court cannot legally require the payment of restitution that is not owed, it will then punish Defendant by a sentence of jail. Such reversal would only serve to reinforce the wrong message that any defendant can purchase his freedom but only if financial sanctions are available to the court. Justice is not for sale but rather a true decision based upon the relevant factors of an individual case.

This court did rely on financial sanctions in effectuating an appropriate sentence. The imposition of the maximum fine is harsh and appears at first blush to be abusive given the voluntary repayment of all monies due and owing by Defendant prior to sentencing. However, the court within its sole discretion can determine the adequacy of such financial sanctions as a means of punishment and or a deterrence to other criminal conduct. A fine imposed is a proper measurement of a sentence while restitution can only be imposed in the event that actual amount are due and owing. This court’s reliance on the “Becker” theory and the determination that financial sanctions alone given the age, physical and mental health of Defendant as well as his unique personal characteristics, is an effective means of providing deterrence and will not equal a complete disregard for the importance of incarceration as an alternative means.

⁶ Appellate Brief of United States of America, Sixth Circuit Court of Appeals, page 32.

The analysis and consideration of the big picture in this case as demonstrated by this court is just the sort of balancing a sentencing court should be doing. See, e.g., *United States v. Duane*, 533 F.3d441, 453 (6th Cir. 2008) (upholding a sentence as substantively reasonable where “the district court clearly considered the § 3553(a) factors that it found most pertinent -- namely the seriousness of the crime, the need for deterrence and the guidelines range.”). As the Sixth Circuit has noted, this is what is meant by the “on-the-scene assessment of the competing considerations” to which appellate review is to defer. *United States v. Grossman*, 513 F.3d at 596.

Accordingly, Defendant requests the court to weigh and balance all the factors outlined by law with the evidence submitted herein. Such factors support both a departure and/or variance from the strict construction of the sentencing guidelines and a blended sentence sanction in lieu of incarceration is sought.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was filed electronically on behalf of Defendant, Samuel Ciccolini, and has been duly served upon the AUSA, via ECF, this 6th day of September, 2012.

/s/ Nancy T. Jamieson
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Attorney for Defendant